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No. 2525

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PHOENIX SECURITIES COMPANY
(a corporation),
Plaintiff in Error,

vs.

M. E. DITTMAR,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

MORRISON, DUNNE & BROBECK,
Attorneys for Defendant in Error.

R. L. MCWILLIAMS,
Of Counsel.

PERNAU PUBLISHING COMPANY

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Introduction.

It will be observed from the transcript in this case that the action was tried without a jury, a jury having been duly waived in writing. That after the introduction of his evidence by the defendant in error, the plaintiff in error proceeded to introduce its evidence; that "the case was thereupon, after argument, submitted to the court for decision and judgment and thereafter and on August 26, 1914, the court ordered judgment to be entered in favor of plaintiff against defendant for the sum of $5000 and costs of suit, and judgment accordingly was entered upon said day" (Tr. p. 156).

It will also be observed that of the thirty (30) alleged errors assigned by appellant, all but three of them are based upon the alleged insufficiency of the evidence to support certain of the implied findings of the court.

The first assignment is based upon the alleged error of the lower court in rendering a judgment in favor of respondent and in not rendering a judgment in favor of appellant.

The last two assignments are based upon the alleged error of the court in overruling the objections interposed by plaintiff in error to two questions propounded to one of respondent's witnesses.

We submit that under these circumstances it is not within the province of this court to review the sufficiency of the evidence. As stated in the recent case of *Tiernan v. Chicago Life Insurance Company* (214 Fed. R. 238; C. C. A. 8th Circ.):

> "It is a rule so well settled as not to require the citation of authority that, when an action at law is tried by a court upon a written waiver of a jury, the sufficiency of the evidence to support the judgment will not be reviewed by an appellate court in the absence of a request by the complaining party at the close of the evidence for a finding or judgment in his favor or special findings by the trial court of the facts established."

In this case, the sufficiency of the evidence not having been challenged at the close of the case by a motion by plaintiff in error for a finding or judgment in its favor, and no special findings having

been made by the court, the case clearly comes within this rule and hence the alleged insufficiency of the evidence is not subject to review.

The same rule is thus stated by the Circuit Court of Appeals of the Seventh Circuit (*Streeter v. Sanitary District of Chicago,* 133 Fed. R. 124, 127), after citing a number of cases:

> "The result of the rulings in these cases is that, if the finding be general, the review is limited to the rulings of the court in the progress of the trial. If the findings be special, the review may extend to the determination of the sufficiency of the facts found to support the judgment. No other or different review is permitted. The special finding of the statute is not a mere report of the evidence, but is a finding of those ultimate facts upon which the law must determine the rights of the parties. If the finding be general, only such rulings of the court in the progress of the trial can be reviewed as are presented by the bill of exceptions, but in such case a bill of exceptions cannot be used to bring up the whole testimony for review, any more than on a trial by jury. * * * *There being then only a general finding, and no agreed statement of facts, inquiry upon review must be limited to the sufficiency of the declaration and to the rulings during the progress of the trial."* (Italics ours.)

The same rule has been enunciated in this circuit (*Blanchard v. Commercial Bank of Tacoma,* 75 Fed. R. 249).

The first assignment of error, that the lower court erred in rendering judgment in favor of respondent and not rendering judgment in favor

of the appellant, cannot be urged for the same reason. No motion having been made by plaintiff in error for a finding or judgment in its favor, the assignment will not be considered by the court.

Accordingly, no objection being made by plaintiff in error to the sufficiency of respondent's complaint, the only questions left for review by this court are the rulings of the lower court on the two questions asked by defendant in error of one of his witnesses.

We submit that plaintiff in error is not in a position to urge its objections as to those rulings because the ground of objections, if any particular ground was specified, does not appear (Tr. pp. 44, 49).

The rule here involved has thus been stated (*Merchants' Inc. Co. v. Buckner,* 110 Fed. R. 345, 346; C. C. A. Sixth Circ.):

> "It is next urged that it was error to permit evidence of the good reputation of defendants in error, no attack having been made upon their reputation by the plaintiff in error at the trial. We find it unnecessary to pass upon this proposition, in view of the state of the record. The exceptions to the admission of testimony of this class are general in their character, failing to point out the ground of exception. It is well settled in the federal courts that such exceptions fail to afford a proper basis for review in an appellate court. The ground of the exception should be disclosed, in order that the court may act understandingly, and correct the error if one has been made. Railroad Co. v. Hellenthal, 31 C. C. A. 414,

88 Fed. 116; Burton v. Driggs, 20 Wall. 125, 22 L. Ed. 299; Toplitz v. Hedden, 146 U. S. 252, 13 Sup. Ct. 70, 36 L. Ed. 961."

Also see

Simkins' Federal Suit at Law, p. 183.

This rule is based upon the well-established doctrine that error will not be presumed but must affirmatively appear in the record.

Statement.

Without waiving these objections to a review of the evidence, we will briefly go over the evidence offered at the trial for the purpose of showing that even if the questions raised by plaintiff in error were subject to review, the lower court did not err in rendering judgment for the defendant in error.

The statement made by the appellant, although substantially correct, is somewhat inadequate to a full appreciation of the facts involved.

It appears that the negotiations for the sale of the property of plaintiff in error began by one Mr. Charles Kunze calling upon the defendant in error, Mr. Dittmar, at Redding, California, about the latter part of November, 1906 to inquire regarding the mining properties involved. Mr. Dittmar informed Mr. Kunze that he thought that the properties could be purchased and having himself origi-

nally sold them to the Phoenix Securities Company suggested that they could probably be had for about $75,000 (Tr. p. 41).

Shortly thereafter, Mr. Dittmar went to New York, and there conferred with Mr. Edward S. Hatch of the firm of Hatch & Clute, representing the plaintiff in error, together with certain of the officers of that company. The result of his interview was that the company agreed to sell its mining properties on an eighteen months option for $75,000, and to allow Mr. Dittmar whatever sum he could get above that as his commission (Tr. p. 41). Upon the return of Mr. Dittmar to California he saw Mr. Kunze, representing Stauffer Chemical Company, the prospective purchaser, and stated that the property could be purchased for $75,000, to which would be added $10,000 as his commission (Tr. p. 42). Mr. Dittmar in his letter, dated February 18, 1907 (Tr. p. 97), informed plaintiff in error of the name of the prospective purchaser and stated that "My commission in the deal will amount to $10,000 and as the buyers know your price and understand that I am to receive a commission of $10,000 when the deal is consummated, it will no doubt be best to make the transfer direct from the Phœnix Securities Company to the Stauffer Chemical Company and at the same time to give me an agreement for $10,000 and authorize the Bank of Shasta County holding the escrow papers to receive $75,000 for your credit and the remaining $10,000 for myself." Before Mr.

Dittmar received a response to that letter, the proposition was made to him by the Stauffer Chemical Company of a reduced price in the event that the latter company decided to purchase the properties for cash or its equivalent. Mr. Dittmar accordingly wrote to the Phœnix Securities Company suggesting such a reduction and recommending that a cash price of $50,000 be made and stating that "so far as my commission is concerned under this proposed clause it can be left in the same proportion as under the general terms of the bond" (Tr. p. 100).

In response to these two letters of defendant in error, the Phœnix Securities Company by Messrs. Hatch & Clute answered in a letter dated February 25, 1907 (Tr. p. 101): "We are very confident that our clients will not pay a commission to exceed ten per cent. of the amount which they receive in cash or kind, and only when they receive it, and that deducted from that ten per cent. must be any other expenses incident to the transaction, so that the client will net out of any sale at least 90% of the purchase money, or price."

In response to that letter defendant in error wrote to Messrs. Hatch & Clute on March 6th (Tr. p. 104) calling attention to the fact that he was not expecting a commission on the purchase price of $75,000, but that the purchaser had agreed to pay $85,000 with the knowledge that $10,000 of this was to be retained by Mr. Dittmar for his

commission. He further states in that letter that, "In case the parties taking the bond make an offer to conclude the deal in ninety days or so and under the circumstances receive a discount on the purchase price then I will be willing in that case to receive 10% of whatever amount is agreed upon."

In Mr. Dittmar's letter of March 13th (Tr. p. 108) he repeats to Messrs. Hatch & Clute, that, "You will note that I am not asking for any commission out of the $75,000 as agreed upon between us", and asks that the escrow instructions of Messrs. Hatch & Clute to the Bank of Shasta County provide "to pay me $10,000 when the deal is concluded, or in case the deal is concluded earlier on a discount basis, the instructions should read that I am to receive 10% commission of the amount involved in the transaction."

Any doubt that may theretofore have existed in the minds of the representatives of the Phœnix Securities Company as to the amount of commission expected by Mr. Dittmar must certainly have been dissipated by these letters from him. With a clear and definite knowledge of what he expected in the way of a commission the plaintiff in error proceeded to the consummation of the contract of sale with the purchaser procured by him.

To preclude any possibility of such misunderstanding on the part of the Phœnix Securities Company we have in evidence the letter of Mr. Dittmar to Mr. C. de Guigne, president of the

Stauffer Chemical Company dated April 20, 1907 (Tr. p. 115), of which Mr. Dittmar sent a copy to the Phœnix Securities Company, referring to his commission of $10,000 in the event that the property was purchased for $85,000, or "in case it is acquired for a lesser amount in shorter time then I am to receive 10% of the purchase price".

In response to the suggestion of Mr. Dittmar that his commission be segregated when the money was paid, Mr. Hatch wrote on April 26, 1907 (Tr. p. 117), objecting to the adoption of such a method since "that is liable to be taken as a reflection upon us", and further that "I doubt if they (Phœnix Securities Company) would consent to what I certainly never would consent to and that is *to have anybody else pay my bills for me.*" This letter clearly shows who Mr. Dittmar was acting for. Mr. Hatch further states in that letter that he hopes that Mr. Dittmar's meaning is that the 10% commission asked by him in the event that the property is sold for $50,000 is to be paid by the Stauffer Chemical Company over and above that sum. Such uncertainty, however, as to the amount of the commission in the event that the property was sold for $50,000, assuming that it existed in his mind, is immaterial since the option to purchase within 90 days was not exercised by the Stauffer Company.

The last letter of Mr. Dittmar to Hatch & Clute offered in evidence, dated May 4, 1907, renders it

absolutely certain that Messrs. Hatch & Clute, as the representatives of the plaintiff in error, knew clearly and distinctly what Mr. Dittmar was expecting in the way of a commission and from whom he was expecting to receive it. Says Mr. Dittmar (Tr. p. 127): "The price fixed to the Stauffer Chemical people was based on $75,000 net to yourselves as discussed while I was in New York; to this price I have added $10,000 as my commission based on an 18 months' contract. This, of course, is a little over 10% but in the sale of mining properties a much larger commission is usual than in ordinary sales unless an outright purchase is made, in which event, the commission is usually based on the amount of money expended in the transaction. If a deal is very large the commission is frequently lower. In case the sale is concluded in the course of a few months for a lower figure than under the time arrangement covering 18 months, then I am willing to accept ten per cent. or a smaller commission percentage than if I must wait for the deal to be consummated 18 months hence."

It is thus clear that the agreement between the parties at this time was for a commission to Mr. Dittmar of $10,000 in case of a sale as originally planned for $85,000 or 10% in case of a cash sale for a lesser amount than originally contemplated. An agreement embodying these terms between the Stauffer Chemical Company and Phœnix Securities

Company, plaintiff in error, was accordingly drawn up as of May 1, 1907 (Tr. p. 129).

Thereafter, and on December 19, 1907, and during the life of the 18-months' option, the Stauffer Chemical Company approached the Phœnix Securities Company, with a statement that conditions in connection with the properties covered by the option were not as favorable as that company had anticipated and stating that "they wanted to *change* the option contract into some other arrangement or some definite contract" (Tr. p. 69). "Thereupon", says Mr. Hatch, "We negotiated together for two or three hours, resulting in a tenative understanding between Mr. Kunze and myself" that the property should be conveyed to a new corporation to be organized for the purpose. This understanding and agreement is embodied in a letter (Tr. p. 149) of Messrs. Hatch & Clute to the Stauffer Chemical Company dated December 27, 1907 [which letter was subsequently taken by the parties as constituting the modified contract (Tr. p. 69)], in which the incorporation and organization of a "dummy" company are outlined and the method of sale of the properties covered by the option contract are set forth. The modified agreement provided for the payment *of $85,000 as in the option contract* (Tr. pp. 152, 3), $2500 of which was to be paid in cash, $37,500 in bonds of the "Dummy Company", and $45,000 being represented by an ore contract. This agreement was carried out and payments made under it amounting up to the time of trial to

$51,000 (Tr. p. 35); $2500 was paid in cash at the time of the making of the agreement (Tr. p. 78); $33,500 represented by the bonds of the "Dummy Company" was paid by the Stauffer Chemical Company (Tr. p. 82), the remaining $4000 of the bonds being remitted by the Phœnix Securities Company in consideration of the Stauffer Chemical Company "agreeing to pay the balance of the bonds on which it was not a guarantor" (Tr. p. 82). The ore contract for $45,000 was "liquidated in July, 1911, between its then holder and owner, being an assignee of one of the creditors, at the sum of $30,000 for which the Summit Copper Company gave its notes" (Tr. p. 83). One of these notes, dated August 1, 1911, was duly paid (Tr. p. 83) and two of which, according to the testimony of Mr. Jentzen, have been paid by the Stauffer Chemical Company since that time (Tr. p. 35), leaving three of the notes, amounting to $15,000 still at the time of the trial undue and unpaid.

Argument.

It is thus evident in our opinion that defendant in error, if not entitled to the whole sum of $10,000 was at least entitled to judgment for the reasonable value of the services rendered by him.

We will freely concede that if Mr. Dittmar, upon securing the execution of the option agreement had then insisted that his commission was due,

such claim would have been without foundation. We do not base our case upon the mere execution of such option agreement. What we do contend is this: Mr. Dittmar first effected a contract between the parties whereby plaintiff in error bound itself to sell the property in question to the Stauffer Chemical Company for the sum of $85,000 and agreed for a consideration to hold such offer open for 18 months to permit the Stauffer Chemical Company in the meantime to explore the lands and determine whether or not it cared to exercise the option. The Stauffer Chemical Company accordingly proceeded to operate the mines upon the lands in conformity to the agreement, and decided *during the life of the option* that the terms proposed were too onerous. It accordingly took up the matter of a *"change"* (Tr. p. 69) in such terms. It was thereupon in the discretion of the plaintiff in error to permit such change, or to refuse the request. Had the Phœnix Securities Company refused to alter the terms of the original agreement, it is possible that the Stauffer Chemical Company would have reconsidered its decision to abandon the project and would have consummated the option contract. Or, had the Phœnix Securities Company referred the matter to Mr. Dittmar, he, by reason of his superior knowledge of conditions, might have persuaded the latter company to consummate the purchase on the original terms.

Undoubtedly, had the Phœnix Securities Company refused to make an alteration of the terms

requested by the Stauffer Chemical Company and the deal had fallen through, Mr. Dittmar would have been entitled to nothing. But plaintiff in error decided to, and did, accept the modifications suggested by the representative of the Stauffer Chemical Company without giving defendant in error an opportunity to use his efforts to procure the consummation of the original contract. It is noteworthy that the substance of these changes was agreed upon the very day that Mr. Kunze, representing the purchaser, requested them. As Mr. Hatch expresses it (Tr. p. 69), "We negotiated together for two or three hours resulting in a tentative understanding * * * and subsequently the details, with some changes and modifications, were reduced to writing." In other words, the negotiations were not broken off, in which case defendant in error might not have been entitled to recover anything, but instead no sooner was the request for a modification made, than it was in substance accepted. When it is said that a broker is not entitled to a commission because the prospective purchaser refuses to accept the terms offered and subsequently new terms are agreed upon between him and the owner, the broker's right to a commission depends, as has been rightly stated in one of our federal courts, "on the continuity of the transaction."

In re Breon Lumber Co., 181 Fed. R. 909, citing 19 Cyc. 251.

It will be noted that the purchase price under the modified agreement was the same as under the option agreement, $85,000. The only difference was in the manner of its payment. Whereas, the original option contract called for the payment of $85,000 on November 1, 1908, in the event that the option was accepted, the new contract provided for the payment of $2500 in cash, $37,500 in bonds, and the balance on a royalty agreement.

There was no time fixed within which Mr. Dittmar was obliged to effect the consummation of the sale, except the implied requirement of a reasonable time. In view of the fact that the option agreement granted the Phœnix Securities Company 18 months within which to consider the purchase and the modified contract was effected within a few months of the execution of such option agreement and during its life, certainly the objection cannot be made that Mr. Dittmar did not procure a customer within a reasonable time.

The case at bar clearly came within the doctrine laid down by the Supreme Court of Virginia in *Ice v. Maxwell,* 55 S. E. 899, 900:

> "Where an agent contracts to furnish a purchaser for lands at a stipulated price and such agent does furnish a purchaser whom the owner accepts, and, in the negotiations of the transaction the owner agrees upon and accepts a different price from that at which the agent was instructed to sell, still such agent would be entitled to his compensation. It cannot be said that where an agent has procured a purchaser for a piece of property the owner can

> deprive him of his commission or compensation by accepting such purchaser and agreeing to take a less sum than the agent agreed to furnish a purchaser for. * * * 'Where by a special contract a broker is not to be paid commissions unless he sells the property at a stipulated price, the sale by him at such a price is a condition precedent to his right to compensation *unless pending the negotiations and whilst the agency remains unrevoked the owner consents to a sale at a different price.* (Italics ours.) If a broker introduces the purchaser or discloses his name to the seller and through such introduction or disclosure negotiations are begun and the sale of the property is effected, the broker is entitled to his commission although in point of fact the sale may have been made by the owner. Where property is sold at a particular price with the consent of the owner, the broker who effected the sale is entitled to his commissions although he may not have been requested by the owner to sell at that price under an agreement to pay commission.'"

The Circuit Court of Appeals of the Third Circuit has thus stated the rule:

> "The real questions, presented in this class of cases are, was there an employment of the broker and if so was he the efficient or procuring cause of the sale? These facts once established it is of no consequence whatever whether the broker was present or absent at the conclusion of the same, *or whether the same was concluded upon the same or different terms than those originally proposed* (Italics ours) or whether or not the principal had knowledge of the broker's agency in procuring the customer."

Colonial Trust Co. v. Pacific Packing and Navigation Co., 158 Fed. R. 277, 281.

Also to the same effect see:

Headley v. Savings Bank of Danbury, 42 Atl. 667; 44 L. R. A. 321 (Conn.);

Jones v. Henry, 36 N. Y. Suppl. 483;

Stewart v. Mather, 32 Wis. 344;

McDonald v. Cabiness, 102 S. W. 721 (Texas 1907);

French v. McKay, 60 N. E. 1068 (Mass. 1902);

McMillin v. Beves, 147 Fed. R. 218 (C. C. A. 1906);

Wilson v. Sturgis, 71 Cal. 226;

Boland v. Ashurst Co., 145 Cal. 405.

The fact that the plaintiff in error agreed voluntarily to remit $4000 from the purchase price under the modified agreement and that it discounted the ore contract in order to satisfy its creditors certainly cannot react to the injury of defendant in error.

> "The services of a realty broker are fully performed and his commission fully earned when the sale of the property is completed or when he has procured a purchaser ready and willing to enter into a valid contract of sale upon the terms fixed by the owner. (Dolan v. Scanlan, 57 Cal. 261; Gunn v. Bank of California, 99 Cal. 349 (33 Pac. 1105); Brown v. Mason, 155 Cal. 155, 21 L. R. A. (N. S.) 328 (99 Pac. 867). The fact that the purchaser in the present case subsequently defaulted in his payments of the purchase price of the land sold was no concern of the plaintiff's assignors. That fact could not operate to deprive them of the commissions due for their services rendered in procuring a pur-

> chaser for the defendant's land, who was willing and at the time was able to buy the property, and who did actually enter into a valid contract of sale at the price and upon the terms specified by the defendant. After a sale of real property has been completed the default or insolvency of the purchaser procured by the broker will not defeat the recovery of the latter's commission. (Shainwald v. Cady, 92 Cal. 83 (28 Pac. 101); Benedict v. Wilson, 10 Cal. App. 719 (103 Pac. 350)."
>
> *Root v. Greadwohl,* 20 Cal. App. 141.

As suggested before, a judgment for defendant in error for the full $10,000 would have been proper under the decisions cited herein. Clearly the least that he should have been held entitled to is $5000, which sum the lower court evidently found was the reasonable value of the services rendered by him.

Certain minor matters are referred to by plaintiff in error as grounds for its contention that the judgment rendered was erroneous. Thus it is suggested that there was no express employment of Mr. Dittmar by plaintiff in error. Even if such were the case such express employment is unnecessary as the court said in one of the cases relied upon by counsel (*Sibbald v. Bethlehem Iron Co.,* 83 N. Y. 378):

> "Nor do we see any fault in the charge of the court in this connection that it was immaterial whether the broker was originally employed or whether after he had brought the thing about the principal availed himself knowingly of the fruits of the action of the broker. This is only saying that the contract of employ-

> ment may be established either by proof of an express and original agreement that the services should be rendered or by facts showing in the absence of such express agreement a conscious appropriation of the labors of the broker."

The following statement by that court is also significant:

> "Indeed, the learned counsel for the defendant very fairly and justly concedes that the contract may be established in some cases 'by the mere acceptance of the labors of a broker'."

It is claimed that the fact that Mr. Dittmar approached plaintiff in error "at the instance" of the Stauffer Chemical Company is fatal to his claim. The law, however, is otherwise. In the case of *Lawler v. Armstrong* (102 Pac. 775, Wash. 1909) in which case such a contention was made, the court held that a broker was entitled to his commission notwithstanding that fact and notwithstanding the further fact that the sale was not consummated for cash as the broker's instructions required where the terms finally agreed upon were approved by the owner.

It is further objected by plaintiff in error that Mr. Dittmar "took the liberty of making changes" in the original contract favorable to the Stauffer Chemical Company. Mr. Dittmar's explanation of this is simply that "such change or modification will be to the interest of all parties concerned". "You will understand" concludes Mr. Dittmar in that letter that "I know conditions in this district

very thoroughly and would not exact anything that is unreasonable on the one hand, nor would I be willing to be a party to a contract that would exact unreasonable things from myself" (Tr. p. 114).

That the suggestions of certain alterations in the contract are not to be taken as an indication that he was representing the Stauffer Chemical Company rather than the Phœnix Securities Company is shown not merely by this explanation given by Mr. Dittmar, but also by the answer thereto by Mr. Hatch. Says the latter (Tr. p. 118): "We regret that you feel constrained to volunteer the suggestions contained in your letter of the 20th to the Stauffer Company, because we assumed that you represented our interests as distinguished from theirs, and that no matter what degree of fairness you use in the matter, you can expect that you will be asked *as representing us* to concede more". Plaintiff in error may differ with Mr. Dittmar upon this point as a matter of professional ethics, but clearly the point has no legal significance in this case. It is fundamental that to defeat the right of a broker to his commission a breach of faith on his part towards his principal must amount in effect to fraud. In the New York case (*Sibbald v. Bethlehem Iron Company,* 83 N. Y. 378), quoted from by counsel, the broker went so far as to advise the prospective purchaser that he thought that a lower cash price than had been asked for

by the owner would be accepted and yet this conduct was not even discountenanced by the court.

The only point that remains for consideration is the contention of plaintiff in error that no count in respondent's complaint stated the facts precisely as they developed upon the trial.

Even if such variance occurred we submit that the objection cannot be urged at this time, particularly in the absence of special findings by the lower court. If the plaintiff in error was surprised by the evidence introduced by defendant in error, it could have asked for a continuance for the purpose of meeting the evidence actually offered. No such request however was made. No word of objection on the ground of variance appears in the record. Under these circumstances, the point raised is clearly untenable.

The rule in the state courts of California has been thus expressed:

> "If, as is claimed, there was a variance between the averments and the proof offered, or that the evidence was not within the issues, defendants should have pointed it out then and there, so that if well taken, opportunity might have been given to amend the complaint."
>
> *Stover v. Stephens,* 16 Cal. App. Dec. 354, 355, citing *Knox v. Highby,* 76 Cal. 264; *Henry v. S. P. R. R. Co.,* 50 Cal. 176.

The Supreme Court of the United States has thus stated the rule:

> "The objection of variance not taken at the trial, cannot avail the defendant as an error in the higher court, if it could have been obviated in the court below. * * * In the case before us the plaintiff was entitled to be apprised of the objection if it were intended to be relied upon, at an early period in the progress of the trial. The court would, doubtless, have permitted an amendment if deemed necessary, upon such terms as the interests of justice might seem to require."
>
> *Roberts v. Graham,* 6 Wall. 578, 18 L. ed. p. 791.

To the same effect is the decision of the court in the case of *Preiss v. Zitt* (148 Fed. R. 617; C. C. A. 8th Circ.):

> "It is well settled that objection to a variance between averment and proof must be taken when the evidence is offered, otherwise it will be deemed to have been waived. If the evidence is sufficient to support the verdict, and it was in this case, mere defects of averment in the pleadings are cured" (citing cases).

The purchaser for the lands in question having originally been procured by defendant in error and the sale of such lands having been actually consummated, though upon modified terms which were satisfactory to the vendor, the evidence of these facts was clearly sufficient to support the judgment and under the cases cited plaintiff in error is not now in a position to urge the objection, even if it were otherwise tenable, that the complaint does not precisely agree with the evidence offered at the trial.

In conclusion, we would call the court's attention to the language employed in the case of *Stewart v. Mather et al.,* 32 Wis. 344, as follows:

> "The authorities cited show that wherever the sale is effected through the efforts of the broker or through information derived from him so that he may be said to be the procuring cause of it, his services are regarded as highly meritorious and beneficial *and the law leans to that construction which will best secure the payment of his commission rather than the contrary.*" (Italics ours.)

Dated, San Francisco,
March 15, 1915.

Respectfully submitted,

MORRISON, DUNNE & BROBECK,
Attorneys for Defendant in Error.

R. L. MCWILLIAMS,
Of Counsel.